Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 84-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK,

Petitioner,

v.

BENIGNO CLASS,

Respondent.

**On Writ Of Certiorari
To The Court of Appeals
Of The State of New York**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the judgment of the New York Court of Appeals was based on adequate and independent state grounds where the court's opinion was expressly predicated on the state constitution and relied on a long line of that court's prior search and seizure rulings.

2. Whether Officer McNamee violated respondent's Fourth Amendment right to be free from unreasonable searches and seizures when, upon stopping respondent's car for a traffic infraction and lacking any reason to believe that the car was stolen, he opened the door, entered the vehicle, reached inside, and moved papers on the dashboard, in order to search for the vehicle identification number.

3. Whether petitioner's claims, raised for the first time before this Court, that (1) a motorist lacks a reasonable expectation of privacy in a vehicle when he has no license, and (2) the police are entitled to search a motorist's vehicle whenever they are authorized to place the person under arrest for a traffic infraction, are not properly or adequately presented for this Court's review and, in any event, are meritless.

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JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257(3). Respondent maintains that the Court lacks jurisdiction because the judgment of the New York Court of Appeals was based on adequate and independent state grounds (*see* Point I, *post*).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The New York Constitution, Article I, Section 12, provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

During the afternoon of May 11, 1981, Police Officers Lawrence Meyer and William McNamee were on routine patrol. They observed respondent driving a 1972 Dodge Charger with a cracked windshield 5 to 10 miles an hour over the speed limit, a speed Officer McNamee deemed "too high for the streets."[1] The officers pulled respondent

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[1] Officer Meyer testified that respondent was traveling at a speed of 35 or 40 miles an hour (A. 13). Since the standard speed limit within

over in a routine traffic stop (Meyer: A. 11-13, 16; McNamee: A. 21-23).

Respondent parked his car at the side of the road; Officer Meyer parked his vehicle directly behind it. Respondent exited his car, closed the door, and joined Officer Meyer at the rear of respondent's vehicle. Respondent gave Meyer the car's registration and insurance papers, but informed Meyer that he had no driver's license (Meyer: A. 12, 15).[2] Meanwhile, Officer McNamee, unaware of respondent's lack of a license, walked over to respondent's car and opened the door on the driver's side in order to locate the vehicle identification number (VIN) (Meyer: A. 12, 15-17; McNamee: A. 21, 24, 26-27). While McNamee searched for the VIN, respondent continued speaking with Officer Meyer (McNamee: A. 26-27).

Officer McNamee opened the door of respondent's car. He first looked, unsuccessfully, for the VIN on the door panel, and then on the dashboard. A piece of paper on the dashboard prevented him from inspecting the VIN from outside the car. To see the number, McNamee reached inside the vehicle and moved the paper. The officer testified that, while doing so, he looked down and saw a gun handle sticking out from under the front seat of the car (McNamee: A. 21, 25-26). Respondent later admitted that the gun belonged to him (Class: A. 36).

Officer McNamee provided no explanation for his desire to inspect the VIN. Neither did Officers McNamee or

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New York City is 30 miles per hour [New York City Traffic Regulations § 60(a)], the dissenting Justice in the Appellate Division and the entire Court of Appeals found that respondent was proceeding at a speed of 5 to 10 miles per hour over the speed limit (A. 49, 55, 61).

[2] At the suppression hearing, respondent answered "No" to the prosecutor's question whether "[o]n that day, [he was] a licensed operator." The judge presiding at the hearing precluded further inquiry into whether respondent ever had a driver's license (A. 36).

Meyer ever voice any suspicion that respondent's car was stolen. Indeed, there was no testimony that the officers ran a radio check on respondent's vehicle to determine whether it had been reported stolen.[3] McNamee, the officer who searched for the VIN, was not in possession of the vehicle's registration or insurance card. Nor did he, upon finding the VIN, check the number against anything or copy it down so he could compare it to these documents (McNamee: A. 25-27). Indeed, neither officer claimed to have checked the VIN against anything else. Notably, there was no testimony that Officer McNamee's search for the VIN was required by any standard police procedures or regulations.

Once Officer McNamee found the gun, he showed it to Meyer, who then arrested respondent for possession of the weapon. The officers also gave respondent a summons for being an unlicensed driver and for driving a car with a cracked windshield (Meyer: A. 17-19). Respondent was neither arrested for the two traffic infractions nor even issued a summons for speeding. Nor was there any testimony that he would have been arrested for the traffic infractions had he not been arrested for possession of the gun.

In its ruling denying respondent's motion to suppress the gun, the court specifically found that "there was no reason to believe the vehicle [respondent] was driving was stolen" (A. 45). The court nonetheless concluded that Officer McNamee's actions were "reasonable and prudent under the circumstances." This finding was based on two facts: respondent's conduct in exiting his vehicle and walking over to the police, and respondent's lack of a driver's

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[3] In fact, as the State concedes (Br. for Pet. at 37), the car was not stolen. It belonged to respondent's brother-in-law (Class: A. 32). Everything in the car's documentation was in order (McNamee: A. 28).

license, which was not then known to McNamee (A. 45-46).

After the court denied his suppression motion, respondent pleaded guilty to criminal possession of a weapon in the third degree. New York Penal Law § 265.02(4) (McKinney Supp. 1984-1985). Although this crime is a felony in New York, respondent was sentenced only to a five year term of probation, after the court found the existence of mitigating circumstances. New York Penal Law § 70.02(5)(b) (McKinney Supp. 1984-1985). In 1984, respondent was discharged from probation.

Respondent appealed the judgment of conviction, contending that the police violated his right, under both the New York and United States Constitutions, to be free from unreasonable searches and seizures, when Officer McNamee entered respondent's car to inspect the VIN without having any reason to believe that the car was stolen. The New York Supreme Court, Appellate Division, affirmed the judgment without opinion (A. 48-49). *People* v. *Class*, 97 A.D.2d 741, 468 N.Y.S.2d 892 (1st Dept. 1983). Justice John Carro dissented, writing that respondent's conduct did not create any suspicion sufficient to justify Officer McNamee's intrusion into the car (A. 49-51).

Respondent then appealed to the New York Court of Appeals, which, by a 5 to 2 decision, reversed the order of the Appellate Division, granted respondent's motion to suppress, vacated his guilty plea, and dismissed the indictment (A. 53). *People* v. *Class*, 63 N.Y.2d 491, 472 N.E.2d 1009 (1984). In an opinion written by Judge Judith Kaye, the court held that Officer McNamee violated respondent's rights, under the New York Constitution and the Fourth Amendment, to be free from unreasonable searches and seizures when he entered respondent's car to search for the VIN.

First, the court held that Officer McNamee's nonconsensual entry into respondent's car to view the VIN constituted a search (A. 57). Second, the court recognized both the governmental interest in VIN inspections and the fact that such inspections usually entail a "lesser invasion of privacy than a full-blown search" (A. 58). Although the court suggested that these factors might justify a requirement of less than probable cause, it concluded that they could not justify completely eliminating the constitutional requirement of a factual predicate for the search. Thus, since Officer McNamee possessed neither probable cause nor any reason to believe that respondent's car was stolen, his entry into the vehicle was unconstitutional (A. 56-59). Third, the court rejected the State's argument that the "public nature" of a VIN negates any expectation of privacy. The court explained that the requirement that manufacturers place VINs on vehicles "does not automatically sanction police intrusion into private space" in order to read the number (A. 58). The court further held that New York Vehicle & Traffic Law § 401 (McKinney Supp. 1984-1985), which permits a police officer to demand of a motorist information necessary to identify the vehicle and owner, does not authorize an officer to intrude into a private vehicle in order to obtain such information. Rather, the statute authorizes police officers only to *demand* information of a motorist, and requires the *motorist* to provide it (A. 60).

In dissent, Judge Hugh R. Jones argued that there was no expectation of privacy with respect to a VIN, and concluded that an officer is entitled to enter a vehicle to inspect the VIN upon lawfully stopping a motorist for a traffic infraction (A. 61-63).

Throughout the litigation of this case in the New York courts, the State has asserted, as the sole basis for upholding Officer McNamee's entry into respondent's

vehicle, that a police officer, upon stopping any motorist for a routine traffic infraction, has the right to intrude into the car to inspect the VIN, even if the officer lacks any reason to believe that the car is stolen. Now peititioner contends, for the first time, that (1) an unlicensed motorist lacks a legitimate expectation of privacy in his vehicle, and (2) a police officer may search the passenger compartment of a vehicle whenever he is authorized to arrest a motorist for a traffic violation even if he does not, in fact, make an arrest (Br. for Pet. at 34n.*). As these issues were never previously raised, the state courts had no occasion to rule on them.

SUMMARY OF ARGUMENT

1. The judgment of the New York Court of Appeals rested on an adequate and independent ground in state law: the court specifically held that state law—Vehicle & Traffic Law § 401 (McKinney Supp. 1984-1985) — did not authorize the police conduct at issue and that Article I, Section 12, of the New York Constitution, which protects the public against unreasonable searches and seizures, prohibited it. The New York constitutional provision has its own well-established identity, independent of the Fourth Amendment. Therefore, the judgment of the Court of Appeals is beyond this Court's review because it rested on an adequate and independent ground in state law. *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983).

The New York Court of Appeals' reliance on New York law on this point is clear from the face of its opinion. Since its decision in *People* v. *Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967), the New York Court of Appeals has held that, as a matter of state constitutional law, a search of a motorist or his vehicle may not be predicated upon a motorist's commission of an ordinary traffic infraction. In the instant case, the court relied on *Marsh* and its progeny to support its conclusion that Officer McNamee vio-

lated respondent's right to be free from unreasonable searches and seizures, as guaranteed by the New York Constitution, by entering his vehicle to inspect the VIN.

2. Since Officer McNamee neither suspected, nor had reason to believe, that the car was stolen, his entry into respondent's car violated respondent's right to be free from unreasonable searches and seizures.

Officer McNamee's entry into respondent's vehicle for the purpose of looking for the VIN constituted a "search" within the meaning of the Fourth Amendment because the officer intruded upon respondent's legitimate and reasonable expectations of privacy when he entered the vehicle, revealing information contained within the car that he could not have ascertained without making the intrusion. *United States* v. *Jacobsen*, 466 U.S. ____, 80 L.Ed.2d 85, 94 (1984).

As a general rule, an officer may not search the interior of an automobile unless he has probable cause. *United States* v. *Ross*, 456 U.S. 798 (1982). Nor may an officer engage in a lesser intrusion upon a motorist's expectation of privacy in a vehicle unless he has an objectively reasonable basis, founded on specific and articulable facts, to do so. *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Terry* v. *Ohio* 392 U.S. 1 (1968). Since Officer McNamee possessed neither probable cause nor any articulable basis for his action, such as a belief that respondent's car was stolen, he violated the Fourth Amendment when he intruded into the car.

3. Because the State's claims were neither asserted in the state courts nor passed on below, this Court should not consider the State's present assertions that (1) an unlicensed motorist lacks a legitimate expectation of privacy in his vehicle, and (2) a police officer may search the passenger compartment of a vehicle whenever he is authorized to arrest the motorist for a traffic infraction,

even where the officer does not arrest or intend to arrest the motorist (Br. for Pet. at 34 n.*). *Illinois* v. *Gates*, 462 U.S. 213, 221-224 (1983).

In any event, these arguments should be rejected because they lack precedent and justification and would negate the substantial protections afforded by the Fourth Amendment. First, petitioner's "unlicensed motorist" theory ignores the fact that a driver has a legitimate expectation of privacy in a vehicle lawfully in his possession, which gives him standing to litigate the constitutionality of any intrusion therein. *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978). Second, petitioner's reliance on the "search incident to arrest" doctrine is misplaced. Although the police could have placed respondent under arrest solely on account of his traffic infractions, they did not do so and there is no basis to believe they would have done so. Moreover, the "search incident to arrest" doctrine is premised on the minimal expectation of privacy that survives after an officer makes an arrest, the police officer's need to protect himself and prevent his prisoner from escaping, and the need to preserve evidence. Therefore, the doctrine is simply inapplicable in a case where, as here, the officers merely stop a motorist for an ordinary traffic infraction and make the arrest only after conducting their search and based solely on the evidence seized as a result of that search. *Sibron* v. *New York*, 392 U.S. 40, 67 (1968).

ARGUMENT

POINT I

THE JUDGMENT OF THE NEW YORK COURT OF APPEALS WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS WHERE THE COURT'S OPINION WAS EXPRESSLY PREDICATED ON THE STATE CONSTITUTION AND RELIED ON A LONG LINE OF THAT COURT'S PRIOR SEARCH AND SEIZURE RULINGS.

Because of limitations on its jurisdiction and in view of the rule against rendering advisory opinions, this Court has no power to review judgments of state courts that rest on adequate and independent state grounds. In order "scrupulously to observe the long standing rule [against reviewing] a judgment of a state court that rests on an adequate and independent ground in state law," this Court can decide a case only where the result was mandated by federal law. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-128 (1945).

In *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983), the Court reiterated the rule against reviewing judgments of state courts that rest on adequate and independent state grounds. However, for cases where "the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court adopted a "plain statement" rule, requiring the state court to make it clear that it relied on federal cases only as persuasive authority. *Id.* at 1040-1041. In the instant case, because the adequacy and independence of the state ground is clear from the face of the state court's opinion, the "plain statement" rule adopted in *Long* does not apply. Accordingly, the judgment of the New York Court of Appeals is beyond this Court's power of review.

The New York Court of Appeals held that New York Vehicle & Traffic Law § 401 (McKinney Supp. 1984-1985) does not authorize, and the New York Constitution for-

bids, a police officer's action, upon stopping a motorist for a routine traffic infraction, in opening and entering the car to inspect the VIN. In the very first sentence of its opinion, the court expressly cited Article I, Section 12, of the New York Constitution as a basis for holding that Officer McNamee violated respondent's right to be free from unreasonable searches and seizures (A. 55). In addition to that explicit invocation of the state constitution, the court made it plain that its judgment flowed from its own prior rulings in a host of cases: *People* v. *David L.*, 56 N.Y.2d 698, 436 N.E.2d 1324, *cert. denied*, 459 U.S. 366 (1982); *People* v. *Miller*, 43 N.Y.2d 789, 373 N.E.2d 286 (1977), *aff'g* 52 A.D.2d 425, 385 N.Y.S.2d 457 (1st Dept. 1976); *People* v. *Perel*, 34 N.Y.2d 462, 315 N.E.2d 452 (1974); *People* v. *Cruz*, 34 N.Y.2d 362, 314 N.E.2d 39 (1974); *People* v. *Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464 (1971); and *People* v. *Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967). Of these decisions, *David L.*, *Perel*, *Cruz*, and *Marsh* all expressly rely on the New York Constitution.

The foundation for the ruling of the New York Court of Appeals in the instant case is *People* v. *Marsh*, *supra*, 20 N.Y.2d 98, 228 N.E.2d 783, in which that court first held that, upon stopping a motorist for an ordinary traffic infraction, a police officer is not entitled to search the motorist. On its face, *Marsh* was based on state law. Before even mentioning the state or federal constitution, Chief Judge Fuld wrote for the court that the New York Legislature never authorized police officers to conduct a search merely upon stopping a motorist for a routine traffic violation. In cases of routine traffic violations, New York law authorizes a police officer to issue a summons to a motorist in lieu of making an arrest. Indeed, in New York City it is customary to do so. *Id.* at 100-101, 228 N.E.2d at 785. As it is neither the necessary nor the usual procedure in New York to arrest a motorist for a routine traffic violation, an officer may not search the motorist

> unless, when the vehicle is stopped, there are reasonable grounds for suspecting that the officer is in dan-

> ger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction.

Id. at 101, 228 N.E.2d at 786.

One rationale for this rule is that, quite simply, evidence of an ordinary traffic infraction is not to be found inside the vehicle. *Id.* at 101, 228 N.E.2d at 785. Additionally, the court reasoned that "[a] motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity. . . ." *Id.* at 101, 228 N.E.2d at 786. The Court of Appeals further held that a search is not authorized even where an arrest warrant had been issued on account of the motorist's violation of the traffic laws. The court wrote:

> [T]he statutory scheme does not contemplate treating [the motorist] as a common criminal to be booked, photographed, fingerprinted and jailed. It is equally degrading—and most assuredly not the Legislature's intention—to subject him to the affront of a search when one is not necessary for the proper execution of the warrant. In short, no search for a weapon is authorized as incident to an arrest for a traffic infraction, regardless of whether the arrest is made on the scene or pursuant to a warrant, unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime.

Id. at 102, 228 N.E.2d at 786.

It is beyond doubt that the rule established by the Court of Appeals in *Marsh* is soundly based on state law. In *People* v. *Perel*, 34 N.Y.2d 462, 468, 315 N.E.2d 452, 456 (1974), which the court also cited in the instant case (A. 57), the Court of Appeals confirmed that *Marsh* held, *as a matter of state law,* that a search may be unreasonable upon an arrest for particular offenses.[4] Indeed, the

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[4] In *People* v. *Weintraub*, 35 N.Y.2d 351, 353, 320 N.E.2d 636, 637

State concedes as much in its brief before this Court (Br. for Pet. at 44 n.*). Only in the penultimate paragraph of its *Marsh* opinion, after establishing that the New York Legislature never authorized the police to conduct a search incident to an arrest for a routine traffic violation, did the court consider whether this rule was required by the state or federal constitution. Moreover, when it did so, the court's citation to the relevant constitutional provisions made it plain that the result was dictated by the state constitution, as well as the federal constitution: "Indeed, this conclusion is also dictated by the constitutional prohibition against unreasonable searches and seizures. (U.S. Const., 4th Amdt; N.Y. Const., art. I, § 12)." *People* v. *Marsh*, 20 N.Y.2d at 102, 228 N.E.2d at 786 (citations omitted).

Having already decided in *Marsh* that New York law prohibits a police officer from searching a motorist stopped for a routine traffic violation, it logically followed that the Court of Appeals would hold, in the instant case, that a police officer may not intrude into a motorist's vehicle to search for the VIN where the officer lacks any reason to believe that the car is stolen.

Indeed, the court's analysis of the relevant statutory and constitutional provisions in the instant case closely parallels that in *Marsh*. As it did in *Marsh*, the Court of Appeals looked to the state statute, and the relevant

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(1974), the Court of Appeals reiterated that its holding in *Marsh* was based on legislative policy as well as on the federal and state constitutional guarantees against unreasonable searches and seizures. Moreover, the rule the Court of Appeals established in *Marsh* survives as a matter of state law, notwithstanding this Court's decision in *United States* v. *Robinson*, 414 U.S. 218 (1973). *People* v. *Troiano*, 35 N.Y.2d 476, 479, 323 N.E.2d 183, 186 (1974) (Rabin, J., concurring). *See generally* Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 Buffalo L. Rev. 157, 166-173 (1979).

legislative intent, to determine whether state law authorized the police conduct at issue. As in *Marsh*, the court found that it did not. The court reasoned that New York Vehicle & Traffic Law § 401, which gives police officers the right to demand information, could not be construed as authorizing a search for that information, whether it be a search of the motorist or of his vehicle (A. 59-60). Moreover, as in *Marsh*, when addressing the constitutional question, the court explicitly declared that such a search violated the state, as well as federal, protections against unreasonable searches and seizures (A. 55).

The conclusion that the judgment of the New York Court of Appeals in the instant case was based on adequate and independent state grounds is reinforced by that court's long tradition of interpreting the New York Constitution generously in favor of the public's right to be free from unreasonable searches and seizures.[5] For instance, in *People* v. *Elwell*, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477 (1980), the New York Court of Appeals held that the New York Constitution goes beyond this Court's holdings in *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Draper* v. *United States*, 358 U.S. 307 (1959), as to the corroboration required to sustain a warrantless search or arrest based on an informant's tip. Likewise, as to

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[5] The mere fact that Article I, Section 12, of the New York Constitution contains the same language as the Fourth Amendment in no way prevents the New York provision from being interpreted to provide greater protection to the public's right to be free from unreasonable searches and seizures than would the Federal Constitution. *Sibron* v. *New York*, 392 U.S. 40, 60-61 (1968); *People* v. *Belton*, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982). In light of the court's express reliance on state constitutional and statutory law, the fact that the court also cited the Fourth Amendment and federal cases does not negate the conclusion that the judgment is based on adequate and independent state grounds. *See State* v. *Casal*, 410 So.2d 152 (Fla. 1982), *writ dismissed as improvidently granted sub nom. Florida* v. *Casal*, 462 U.S. 637 (1983).

searches incident to arrest, the Court of Appeals has interpreted Article I, Section 12, of the New York Constitution in a manner different than this Court has interpreted the Fourth Amendment. *See People* v. *Belton*, 55 N.Y.2d 49, 51, 432 N.E.2d 745, 746 (1982); *People* v. *Gokey*, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724 (1983); *People* v. *Smith*, 59 N.Y.2d 454, 457-459, 452 N.E.2d 1224, 1227 (1983).

The ample state grounds relied upon here serve to distinguish the instant case from *Michigan* v. *Long*, 463 U.S. 1032 (1983). There, this Court held that a state court decision which "relied *exclusively* on [federal caselaw]" and cited "[n]ot a single state case" in support of the result was not based on adequate and independent state grounds. *Id.* at 1043 (emphasis in original). Indeed, an inspection of the Michigan Supreme Court's decision in *People* v. *Long*, 413 Mich. 461, 320 N.W.2d 866 (1982), reveals that the result turned entirely on that court's analysis of this Court's holding in *Terry* v. *Ohio*, 392 U.S. 1 (1968). In this case, by contrast, the New York Court of Appeals cited ample state grounds to support its analysis and result. In *Long*, the defendant never raised his state law claim until his case was before this Court. *People* v. *Long*, 419 Mich. 636, 359 N.W.2d 194, 200 (1984) (on remand). By contrast, in the instant case respondent maintained, throughout his appeals in the state courts, that McNamee's intrusion into his vehicle violated both state and federal law.

This Court's cases since *Long* reinforce the conclusion that the judgment of the New York Court of Appeals in the instant case rests on adequate and independent state grounds. In *Ohio* v. *Johnson*, 467 U.S. ____, 81 L.Ed.2d 425, 432 n.7 (1984), this Court held that, where the syllabus to the state court's opinion, the only portion on which the entire state court had to agree, referred to the prohibition against double jeopardy without expressly

invoking the state's double jeopardy provision, the judgment did not rest on adequate and independent state grounds. Here, by contrast, in the first sentence of its opinion the state court expressly relied on Article I, Section 12, of the New York Constitution, which protects the public against unreasonable searches and seizures (A. 55). Similarly, unlike the state court opinion in *Maine* v. *Thornton*, 466 U.S. ___, 80 L.Ed.2d 214, 222 n.5 (1984), the New York Court of Appeals relied on the state constitution and cases which were firmly based on state law. Like *Colorado* v. *Nunez*, ___ U.S. ___, 79 L.Ed.2d 338, 341 (1984), the instant case involves a situation where the state court based its judgment on its own prior cases (*e.g.*, *People* v. *Marsh*) which in turn were founded on state law. In a case where, as here, the decision sought to be reviewed rests on both state and federal grounds, either of which are dispositive, this Court lacks jurisdiction. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). The writ should therefore be dismissed.

POINT II

OFFICER McNAMEE VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN, UPON STOPPING RESPONDENT'S CAR FOR A TRAFFIC INFRACTION AND LACKING ANY REASON TO BELIEVE THAT THE CAR WAS STOLEN, HE OPENED THE DOOR, ENTERED THE VEHICLE, REACHED INSIDE, AND MOVED PAPERS ON THE DASHBOARD, IN ORDER TO SEARCH FOR THE VEHICLE IDENTIFICATION NUMBER (VIN).

As a general rule, a police officer violates the Fourth Amendment when he searches a vehicle without probable cause. Any constitutionally cognizable intrusion into a vehicle, moreover, even if it is not deemed a "full-blown search," is impermissible unless the officer has an objectively reasonable basis, founded on specific and articula-

ble facts, to support such action. Where a police officer opens the door of a private automobile and enters, without individualized suspicion, to search for the VIN, disturbing the motorist's papers in the process, the officer violates the motorist's right to be free from unreasonable searches and seizures.

A. When Officer McNamee Opened The Door Of Respondent's Car And Entered It To Look For The VIN, And Thus Exposed Private Areas Not Otherwise Visible, He Conducted A Search Governed By The Fourth Amendment.

Under the Fourth Amendment, a police officer conducts a "search" when he infringes upon "an expectation of privacy that society is prepared to consider reasonable." *United States* v. *Jacobsen*, 466 U.S. ___, 80 L.Ed.2d 85, 94 (1984). The word "search" means a prying into hidden places in an effort to discover objects or information not open to view. *Black's Law Dictionary* 1211 (5th Ed. 1979). It is this very common sense notion that has animated the Court's rulings in this area. When a police officer, as here, opens the door of a private automobile and enters the car to probe for information, and thereby exposes areas otherwise inaccessible to view, he conducts a search that must meet the requirements of the Fourth Amendment.

As a threshold matter, it is well-established that, despite the special nature of an automobile, a motorist has some legitimate expectation of privacy within the interior of a car. *See Delaware* v. *Prouse*, 440 U.S. 648, 662-663 (1979). The State concedes as much (Br. for Pet. at 20). As in any case where government agents intrude upon legitimate expectations of privacy, their action must be measured against the requirements of the Fourth Amendment.

In determining whether a police officer conducts an intrusion into an area in which there is a legitimate expec-

tation of privacy, and thus must comply with the requirements of the Fourth Amendment, the standard this Court has consistently articulated considers whether the officer exposes areas or information to which he otherwise would not have access. Thus, the placement of a "beeper" on an automobile to monitor a person's movements on the road is not a search, as it exposes nothing but openly visible, public conduct as to which one accordingly lacks any expectation of privacy. *United States* v. *Knotts*, 460 U.S. 276, 282 (1983). Or, when an officer peers into the interior of a private automobile from outside the vehicle, even if he is aided by a flashlight, the officer conducts no search, as he merely views that which would be visible to "inquisitive passersby" and as to which one therefore could not reasonably entertain any expectation of privacy. *Texas* v. *Brown*, 460 U.S. 730, 739-740 (1983). Similarly, where an intrusion can be so limited that no personal information is exposed, but only contraband is detected, there is no search within the Fourth Amendment. *United States* v. *Place*, 462 U.S. 696, 707 (1983) (canine sniff); *United States* v. *Jacobsen*, *supra*, 80 L.Ed.2d at 100-101 (chemical test of drugs).

Applying these precedents, it is indisputable that Officer McNamee conducted a "search" when he opened the door of respondent's car and entered the vehicle in an effort to inspect the VIN. The information McNamee sought, by the officer's own testimony, could not have been discovered without making a physical intrusion into respondent's vehicle (McNamee: A. 21, 25). Moreover, McNamee's investigative procedure was not so limited as to expose only the mere presence of "contraband" (here, by analogy, the VIN), as his intrusion enabled him to view anything respondent may have placed in the front part of the vehicle. Indeed, the State concedes that Officer McNamee conducted a "limited entry and search" into respondent's vehicle, which had the "effect of presenting

to police view a few locations near the floor of the car which might have otherwise remained unseen" (Br. for Pet. at 14, 29, 30, 33). Thus, McNamee's intrusion into the car may have been "less intrusive than a full-scale search but it [did] reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained." *United States* v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 541-542 (1984).[6]

While conceding that an individual retains an interest of privacy within his vehicle (Br. for Pet. at 20, 24, 47), the State asserts that the pertinent and dispositive fact is respondent's lack of expectation of privacy in the VIN itself, and that the "special nature and purpose of the VIN" requires that Fourth Amendment standards be ignored (*id.* at 18). Such a proposition stands Fourth Amendment analysis on its head, as it ignores the specific constitutional protection attaching to the *situs* of the intrusion ("persons, houses, . . . and effects"), and looks solely to the nature of the *object* sought to be discovered. Indeed, this Court has held that, even where there is no expectation of privacy in the object of discovery (such as contraband), the challenged intrusion will be exempt from usual Fourth Amendment standards only if it is limited to detecting the presence of that contraband and risks infringement upon no other privacy interest. *United States* v. *Jacobsen*, *supra*, 80 L.Ed.2d at 100-101; *United States* v. *Place*, *supra*, 462 U.S. at 707.

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[6] The State's suggestion that Officer McNamee could have seen the weapon under the front seat of respondent's car without physically intruding into the vehicle (Br. for Pet. at 24, 26) finds no support in the record. Nor did petitioner ever rely on this ground when the case was in the state courts. Obviously, had Officer McNamee seen the weapon from outside the vehicle, where he was entitled to be, respondent would have no cause to complain. *Texas* v. *Brown*, *supra*, 460 U.S. 730. But this is not such a case.

Thus, since Officer McNamee's intrusion meets the definition of a search, because it exposed areas in which respondent's privacy interests remained, the fact that Officer McNamee was looking for the VIN, an object in which respondent might have had minimal expectation of privacy, is constitutionally irrelevant.[7] Accordingly, the fact that the VIN contains information useful to law enforcement officials does not negate the Fourth Amendment's application to cases where the officer intrudes into a private vehicle to obtain that information. Nor does the fact that automobile manufacturers are required to place VINs in cars defeat a motorist's privacy interest against intrusions into his vehicle. As one distinguished commentator has written:

> [The argument] that entry of a vehicle to find the VIN is no search and thus is not "within the scope of the Fourth Amendment" is unsound. That form of police surveillance, it is submitted, should not go totally unregulated by constitutional restraints, for that would mean that police could enter any particular car on a whim and that they could make wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen. Such sur-

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[7] Indeed the State's own reasoning is self-defeating. Petitioner analogizes the VIN to a person's fingerprints, citing the lack of an expectation of privacy in either (Br. for Pet. at 20). Yet, in *Hayes* v. *Florida*, 470 U.S. ____, 84 L.Ed.2d 705 (1985), this Court analyzed the interference with a suspect's liberty under the Fourth Amendment, even though the purpose of his detention was merely to obtain his fingerprints, and found such detention unconstitutional under the standards articulated in *Terry* v. *Ohio*, 392 U.S. 1 (1968). As in *Hayes*, focus on the object of the search or seizure would beg the question of whether the intrusion to discover that object falls within and meets Fourth Amendment standards. Similarly, the State analogizes the VIN to one's license and registration (Br. for Pet. at 20-23). This logic would justify otherwise unconstitutional searches and seizures of a motorist simply because the intrusion was designed to locate these "public" papers.

> veillance intrudes upon a justified expectation of privacy and thus, as *Katz* v. *United States* [389 U.S. 347 (1967)] teaches, is subject to Fourth Amendment limitations.

W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.5, pp. 359-360 (1978).

The State notes that the VIN is often capable of being viewed from outside the car (Br. for Pet. at 18). Of course, to the extent a police officer can inspect a car's VIN in "plain view," without making a physical intrusion into the vehicle, no search occurs within the meaning of the Fourth Amendment. *Texas* v. *Brown*, *supra*, 460 U.S. 730.[8] Where, however, as the New York Court of Appeals decided in this case, the officer intrudes into a vehicle to discover information otherwise not available by a "plain view" inspection, he conducts a "search" governed by Fourth Amendment standards. *Simpson* v. *United States*, 346 F.2d 291, 294 (10th Cir. 1965); *State* v. *Moore*, 66 Hawaii 202, 659 P.2d 70, 72 (1983); *People* v. *Piper*, 101 Ill.App.3d 296, 427 N.E.2d 1361, 1364 (1981); *State* v. *Simpson*, 95 Wash.2d 170, 622 P.2d 1199, 1210 (1980); *see also State* v. *McGann*, 124 N.H. 101, 467 A.2d 571 (1983) (reaching this result based on the state constitution).[9]

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[8] Several of the lower court cases the State cites for the proposition that a VIN inspection is not a search (Br. for Pet. at 16-17) involve "plain view" examinations by a police officer from outside the vehicle, which clearly impinge on no legitimate expectations of privacy. *United States* v. *Zemke*, 457 F.2d 110 (7th Cir.), *cert. denied*, 406 U.S. 947 (1972); *State* v. *Cohn*, 284 So.2d 426 (Fla. Dist. Ct. App. 1973); and *People* v. *Brooks*, 405 Mich. 225, 274 N.W.2d 430 (1979).

[9] In many of the lower court cases cited by the State in which a VIN inspection has been held not to constitute a "search" (Br. for Pet. at 16-17), the courts ruled that the police conduct was not a search requiring probable cause, but nevertheless considered whether the police officer had a "legitimate" or "reasonable" basis to examine the VIN. *See United States* v. *Forrest*, 620 F.2d 446 (5th Cir. 1980); *United States* v. *Duckett*, 583 F.2d 1309 (5th Cir. 1978); *United States*

The State concedes that respondent had a legitimate expectation of privacy in the interior of his vehicle (Br. for Pet. at 20). The State further concedes that Officer McNamee entered the car and displaced papers on the dashboard to obtain information from the interior (*Id.* at 25-26). Finally, the State concedes that Officer McNamee's conduct constituted an "entry and search," albeit "limited," which exposed "a few locations near the floor of the car which might have otherwise remained unseen" (*Id.* at 30, 33). This Court considered it to be "nothing less than sheer torture of the English language" to characterize a frisk as being anything other than a "search" governed by the Fourth Amendment. *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968). Likewise, it is inconsistent with this Court's precedents and tortures the English language to suggest that Officer McNamee conducted anything other than a "search" within the Fourth Amend-

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v. *Brown*, 535 F.2d 424 (8th Cir. 1976); *United States* v. *Ware*, 457 F.2d 823 (7th Cir.), *cert. denied*, 409 U.S. 888 (1972); *United States* v. *Zemke*, *supra*, 457 F.2d 110; *United States* v. *Powers*, 439 F.2d 373 (4th Cir.), *cert. denied*, 402 U.S. 1011 (1971); *United States* v. *Johnson*, 431 F.2d 441 (5th Cir. 1970); *United States* v. *Graham*, 391 F.2d 439 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968); *Cotton* v. *United States*, 371 F.2d 385 (9th Cir. 1967); *People* v. *Brewer*, 112 Mich. App. 670, 317 N.W.2d 218 (1981); *Wood* v. *State*, 632 S.W.2d 734 (Tex. Crim. App. 1982); and *Shirley* v. *Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977). Thus, these cases do not stand for the proposition that the Fourth Amendment is inapplicable to VIN inspections; in fact, they implicitly support the contrary conclusion. There are relatively few cases involving intrusive VIN inspections which employ no Fourth Amendment criteria to determine whether the police procedure was permissible: *United States* v. *Kitowski*, 729 F.2d 1418 (11th Cir. 1984); *United States* v. *Wood*, 500 F.2d 681 (5th Cir. 1974); *United States* v. *Polk*, 433 F.2d 644 (5th Cir. 1970); *State* v. *Sedacca*, 252 Md. 207, 249 A.2d 456 (1969); and *People* v. *Valoppi*, 61 Mich. App. 470, 233 N.W.2d 41 (1975). Therefore, the State is inaccurate when it asserts that the holding of the New York Court of Appeals herein "reflects a minority view which conflicts with the weight of lower court authority considering the issue of VIN inspections" (Br. for Pet. at 16).

ment when he opened the car door, reached inside, and disturbed papers on the dashboard, to obtain information from within the vehicle.[10]

B. Officer McNamee Conducted An Unreasonable Search When, Lacking Probable Cause Or A Reasonable Suspicion That Respondent's Car Was Stolen, He Searched The Car For The VIN.

Under the Fourth Amendment, a search of private property without proper consent is unreasonable, except in certain carefully delineated situations, unless the officer has prior authorization in the form of a valid search warrant. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978). Because of an automobile's mobility, the complex scheme of regulations governing motor vehicles, and the lesser expectations of privacy the public holds with regard to private cars, an officer may search an automobile without a warrant, but the requirement of probable cause remains inviolate. *California* v. *Carney*, 471 U.S. ___, 85 L.Ed.2d 406 (1985); *United States* v. *Ross*, 456 U.S. 798, 809 (1982); *Carroll* v. *United States*, 267 U.S. 132 (1925).[11] As this Court emphasized in *Almeida-Sanchez*

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[10] None of the State's litany of hypothetical cases in which a police officer might be allowed to intrude into a private vehicle (Br. for Pet. at 7, 24-25) involve a situation in which a police officer's incursion into the car is prompted by a desire, as here, to probe for information, which is the *sine qua non* of a search. Moreover, these situations all involve exigent circumstances. *See Payton* v. *New York*, 445 U.S. 573, 590 (1980).

[11] The few narrow, carefully drawn exceptions to the rule barring the police from searching a vehicle except upon probable cause, none of which are relevant to the instant case, include the right of the police, as a protective measure and in accordance with standard procedures, to conduct an inventory search of a vehicle impounded after the motorist is arrested [*South Dakota* v. *Opperman*, 428 U.S. 364 (1976)], and, upon making a lawful custodial arrest of a motorist, to search the person's vehicle [*New York* v. *Belton*, 453 U.S. 454

v. *United States*, 413 U.S. 266, 269 (1973), the "automobile exception" to the warrant requirement, established in *Carroll*, did not "declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."

Even where the police officer's intrusion is deemed less than a "full-blown search," the Fourth Amendment still requires that the officer comply with the prohibition against unreasonable searches and seizures. To be justified under the Fourth Amendment, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the officer's] intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). The facts, moreover, must

> be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Id. at 21-22 (citations omitted); *see also United States* v. *Place*, 462 U.S. 696, 703 (1983) (mere fact that intrusion is deemed "minimal" does not negate requirement that police have a reasonable basis for intruding on protected Fourth Amendment interest).

These principles apply with no less force when the intrusion concerns motorists and automobiles, and where

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(1981)]. Contrary to the State's assertion (Br. for Pet. at 33), the "administrative search" doctrine articulated in such cases as *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) and *United States* v. *Biswell*, 406 U.S. 311 (1972) does not authorize a police officer lacking probable cause to search an ordinary motorist. *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973).

the intrusion constitutes less than a full-blown search. Thus, in *Delaware* v. *Prouse*, 440 U.S. 648, 662-663 (1979), this Court held that the Fourth Amendment affords substantial protection to a motorist's expectation of privacy:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry* v. *Ohio*, *supra*, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Accordingly, consistent with the Fourth Amendment, a police officer may stop a motorist and detain him to check his driver's license and the registration of the automobile only where the officer has an articulable and reasonable suspicion that the motorist is unlicensed, the automobile is not registered, or either the vehicle or an occupant is otherwise subject to seizure for a violation of the law. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 663.

In reaching this result, the Court rejected Delaware's assertion that patrol officers should be subject to no constraints in deciding which vehicles they will stop because of the State's interest in discretionary spot checks as a way to ensure highway safety and because of the limited

intrusion such a procedure imposes on the public. *Id.* at 655. While fully acknowledging the state's "vital interest" in making sure that motorists and vehicles comply with the highway laws and regulations, *id.* at 658, the Court nonetheless concluded that, on the record before it, Delaware had failed to show that "the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." *Id.* at 659. Given the availability of less intrusive procedures, the Court was not convinced that stopping vehicles without articulable suspicion was justified. *Id.*

Similarly, in *Michigan* v. *Long*, 463 U.S. 1032 (1983), the Court held that, upon lawfully stopping a motorist, a police officer may conduct a limited "protective search" of the passenger compartment of the automobile if the officer has an objectively reasonable belief, based on specific and articulable facts, that the suspect is dangerous and may gain immediate control of weapons. *Id.* at 1051. In reaching this decision, the Court stressed that, whenever the police conduct an investigative stop, they are not authorized, *ipso facto*, to conduct an automobile search, as they would be authorized to do, under *New York* v. *Belton*, 453 U.S. 454 (1981), when they make a lawful custodial arrest. In an ordinary traffic stop, the police officer lacks an important justification for a search that exists in an arrest situation, *i.e.*, the need to preserve evidence. *Michigan* v. *Long*, *supra*, 463 U.S. at 1049 n. 14.

Emphatically, whether the police conduct is deemed to be a "full-blown search" or a lesser, constitutionally cognizable intrusion (analogous to *Terry*), a police officer may not intrude on a motorist's legitimate expectations of privacy where he lacks any reasonable basis, founded on specific and articulable facts, to support his action. The officer must, at a minimum, have some "quantum of individualized, articulable suspicion" to justify his intrusion on protected privacy interests and to satisfy the "reason-

ableness standard" of the Fourth Amendment. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 662; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976). This rule must not be eviscerated if "[t]he word 'automobile' is not [to become] a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 461-462 (1971) (plurality opinion).[12]

In arguing that no individualized factual basis need accompany a search of a car for the VIN, the State asks this Court to depart from its precedents requiring reasonable suspicion or probable cause whenever an officer probes a private space, exposing otherwise private information. In support of its argument that the fundamental requirement of individualized suspicion be abandoned, the State advances no justifications that have not already been fully considered in these precedents. Petitioner, for example, relies heavily on the reduced expectation of privacy within an automobile and the State's interest in "the pervasive regulatory scheme" as reasons to exempt a VIN inspection from Fourth Amendment dictates (Br. for Pet. at 21). However, these precise rationales were only considered sufficient to justify dispensing with the warrant requirement:

> In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of automobiles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

California v. *Carney*, *supra*, 85 L.Ed.2d at 414. Moreover, the very regulatory interests cited by the State—

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[12] The instant case arose in a law enforcement setting, the precise situation where the Fourth Amendment's requirement of individualized suspicion is most applicable. *New Jersey* v. *T.L.O.*, 469 U.S. ____, 83 L.Ed.2d 720, 740 (1985) (Powell, J., concurring).

promoting public safety, ensuring the qualifications of vehicles and their operators, and ensuring compliance with licensing, registration, and inspection requirements (Br. for Pet. at 21-22) — were considered in *Prouse*, 440 U.S. at 658, as only sufficient to justify further reducing the probable cause requirement to reasonable suspicion. Thus, these rationales, which have already justified substantial departures from the Fourth Amendment's warrant requirement, cannot be invoked in new guise as cause to eliminate the mandate of an individualized quantum of suspicion.

Nor is generalized concern for law enforcement, arising from such a fact as the large automobile theft problem in the United States (Br. for Pet. at 23 n.*), a sufficient basis for the Court to ignore the imperatives of the Fourth Amendment. When it has been faced with other difficult law enforcement problems, such as during the Prohibition era [*Carroll*] or today, with the current law enforcement concern about illegal immigration [*see Almeida-Sanchez* v. *United States*, 413 U.S. 266, 276 (1973) (Powell, J., concurring)],[13] the Court has held steadfastly to the requirement that an officer may not be granted unbridled discretion in conducting a search. Therefore, none of the

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[13] Roving patrols operating under the authority of the United States Border Patrol may not stop an automobile unless the officers have specific and articulable facts reasonably warranting suspicion that the vehicle contains illegal aliens. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975). On the other hand, because stopping cars at fixed checkpoints shows a high degree of effectiveness in curtailing illegal immigration, the officials lack any less intrusive methods, and the use of this procedure avoids granting undue discretion to the officer in the field, Border Patrol officers are entitled to employ this procedure even where they lack individualized suspicion as to particular vehicles. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). Even at a fixed checkpoint, however, the Border Patrol may conduct a search only if the officers have probable cause. *United States* v. *Ortiz*, 422 U.S. 891 (1975).

State's arguments justify abandoning the minimal Fourth Amendment requirement that a police officer have individualized and reasonable suspicion in order to search an automobile.

Not only is the holding of the New York Court of Appeals in the instant case therefore consistent with the prior decisions of this Court, but the court's analysis also furthers the policies of the Fourth Amendment which this Court has discussed therein.

As in *Prouse*, the record here does not establish that law enforcement officers lack less intrusive methods to combat the problem of car theft which the State emphasizes. *Cf. United States* v. *Place*, 462 U.S. 696, 709 (1983); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 589 (1983); *Florida* v. *Royer*, 460 U.S. 491, 504-506 (1983) (White, J.); *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979). As the New York Court of Appeals held, the police officers could have acted under the authority of Vehicle & Traffic Law § 401 (McKinney 1984-1985) and demanded to see the VIN. Alternatively, they might have run a radio check on the vehicle's license plates through the computer network operated by the National Crime Information Center.[14] Since there is no demonstrably compelling justification for such a procedure, police officers should not be permitted to intrude on the physical integrity of private automobiles in order to inspect the VIN, where they lack any articulable suspicion that the vehicle in question has been stolen. If the police are permitted to intrude into the

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[14] As is well known, radio checks of license plates frequently enable law enforcement officials to identify stolen vehicles. *See, e.g., United States* v. *Matlock*, 558 F.2d 1328 (8th Cir.), *cert. denied*, 434 U.S. 872 (1977); *United States* v. *Jamerson*, 549 F.2d 1263 (9th Cir. 1977); *United States* v. *Harris*, 479 F.2d 508 (5th Cir. 1973); *United States* v. *Williams*, 440 F.2d 1235 (6th Cir.), *cert. denied*, 404 U.S. 837 (1971); *Commonwealth* v. *Evans*, ____ Pa. Super. ____, 494 A.2d 383 (1985); *State* v. *Green*, 680 S.W.2d 474 (Tenn. Crim. App. 1984).

passenger compartment of private automobiles in order to conduct VIN inspections without any articulable grounds, the number of motorists whose privacy will be violated merely to detect one single stolen car will be large indeed. *See Delaware* v. *Prouse*, *supra*, 440 U.S. at 660. Such widespread intrusions into a motorist's legitimate expectation of privacy violate the most fundamental policies of the Fourth Amendment.

The State's argument, moreover, would eviscerate the core of the Fourth Amendment: the need "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown* v. *Texas*, 443 U.S. 47, 51 (1979). Thus, in order to detect aliens, the stopping of vehicles without individual suspicion at fixed checkpoints is permitted, *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 559, but the same may not be done by roving patrols, *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 881. Similarly, officers may not exercise unbridled discretion in choosing which vehicles they will pull over for registration or license checks. *Delaware* v. *Prouse*, *supra*, 440 U.S. at 655. Petitioner's claim that a police officer should be authorized to physically intrude into a private automobile to inspect the VIN, even where the officer has no articulable suspicion that the car is stolen, invites precisely the "standardless and unconstrained discretion" which this Court has vigorously condemned. *Id.* at 661.

The state courts found (A. 45-46, 50, 56, 59, 61), and petitioner concedes (Br. for Pet. at 32), that the police lacked probable cause or reasonable suspicion to believe that respondent's car was stolen or that it contained contraband. Indeed, Officer McNamee never voiced any reason for his intrusion. Nor did he do anything with the VIN once he found it, such as compare the number to other documents. Accordingly, regardless whether McNamee's

conduct is deemed a "full-blown search" requiring probable cause, as in *Carney* and *Ross*, or a lesser intrusion cognizable under the Fourth Amendment, as in *Long*, *Prouse*, and *Terry*, the officer's actions in opening the door, entering the car, and disturbing papers on the dashboard, in a search for the VIN, violated respondent's right to be free from unreasonable searches and seizures.

All the circumstances point to the conclusion that Officer McNamee, lacking any rules, guidelines, standard procedures or any other neutral criteria to justify his action, acted on no more than his own "hunch" or whim when he intruded into respondent's car to inspect the VIN. Indeed, as the highest court in New York held (A. 60), in intruding into the car without first asking respondent for the information he desired, Officer McNamee completely disregarded Vehicle & Traffic Law § 401, the rule the New York Legislature enacted to govern precisely this situation. McNamee's intrusion into the car must be seen for what it was: a wholly unjustified interference with respondent's constitutional right to personal autonomy and security, free from arbitrary violation by an agent of the State.

Recognizing that Officer McNamee had no factual basis for his intrusion into the car, the State seeks to impute to him Officer Meyer's knowledge that respondent lacked a driver's license (Br. for Pet. at 31). At the time he entered respondent's vehicle, Officer McNamee had no knowledge of this fact. Nevertheless, solely because McNamee's partner learned of respondent's unlicensed status simultaneous to McNamee's incursion into the car, the State insists that McNamee should be credited with this information. The essence of Fourth Amendment analysis, however, is that a police officer's conduct must be measured against the information he possesses at the time of his action. *Terry* v. *Ohio*, *supra*, 392 U.S. at 21-22. Only where a police officer relies on a directive from a fellow

officer or another law enforcement agency can he be credited with any information possessed by another. *Whitely* v. *Warden*, 401 U.S. 560, 568 (1971). This Court's decision in *United States* v. *Hensley*, 469 U.S. ____, 83 L.Ed.2d 604 (1985), on which the State relies, demonstrates that petitioner's argument is groundless. In *Hensley*, the Court held that police officers may rely on a "wanted" bulletin issued by another police department. 83 L.Ed.2d at 614. Thus, one officer's knowledge can be imputed to another officer only where there is a transmittal of information. Mere collective knowledge, without a transmittal of information or a specific directive, is insufficient. Accordingly, since McNamee acted entirely on his own, and did not delay his intrusion into the vehicle long enough to learn what respondent told his partner, any information his partner learned but did not transmit prior to the entry into the car cannot be imputed to McNamee.[15] Any contrary rule would make a mockery of Fourth Amendment analysis.

The State erroneously finds support in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), for its contention that a police officer, upon lawfully stopping a motorist for a traffic infraction, is entitled to intrude into the vehicle to inspect the VIN even if the officer lacks any reason to suspect the car is stolen (Br. for Pet. at 29). *Mimms*, however, is inapplicable for several important reasons.

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[15] The State's reliance on *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972) (Br. for Pet. at 31) is misplaced. In *Ragsdale*, the court based its conclusion on the fact that the officer who had the information would have had a duty to act as his partner did in searching the vehicle. *See* W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.5, pp. 631-634 (1978). In the instant case, the State has not shown that Officer Meyer, upon finding that respondent was unlicensed, had a duty to look at the VIN, or that he would have done so.

First, it was largely because of the "inordinate risk confronting an officer as he approaches a person seated in an automobile," *Mimms*, *supra*, 434 U.S. at 110, that the Court deemed it necessary to authorize a police officer to order a motorist out of his vehicle. This Court rightfully does not equate the ordinary law enforcement concerns present here — the discovery of the VIN for the purpose of enforcing a regulatory scheme or, at most, to recover stolen vehicles — with the imperative of protecting a police officer or the public from a possibly armed suspect.[16] Notably, in the instant case, Officer McNamee asserted no particular safety rationale in support of his search for the VIN in respondent's car.[17] Finally, in *Mimms* the officer lacked any less intrusive means to ensure his safety. In seeking to recover stolen vehicles, by contrast, an officer has many alternative procedures available to him. In *Mimms*, the Court stressed that the officer merely moved the situs of an already legal detention, and such intrusion hardly rises to the level of a "petty indignity." *Id.* at 111. In the instant case, by contrast, the State seeks authorization for police officers to turn a routine

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[16] *Cf. New York* v. *Quarles*, 467 U.S. ____, 81 L.Ed.2d 550, 557 (1984) (adopting an exception to the *Miranda* rule where necessary to protect the public against the dangers that arise when a gun is hidden in a supermarket); *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983) (distinguishing an officer's reasonable efforts to protect his own safety from a mere attempt to collect evidence); and *Terry* v. *Ohio*, *supra*, 392 U.S. at 27 (authorizing a police officer to frisk an individual whom he has reason to believe is armed and dangerous).

[17] The State simply is wrong in asserting that the decision of the New York Court of Appeals itself gives rise to some kind of danger for police officers (Br. for Pet. at 27). The Court of Appeals' decision does not require the officer to allow the motorist back into his vehicle, but, rather, merely suggests this as one constitutional option. Another constitutional option is to secure the motorist's consent. Where, as here, the officers had no fear for their safety, they could have chosen either option.

traffic stop into a search of the interior of the vehicle, which plainly involves an intrusion qualitatively different and more serious than that which occurred in *Mimms*. Indeed, *Mimms* ultimately supports our position that any further intrusion in the nature of a search *cannot* be made in the absence of articulable suspicion. The frisk in *Mimms* was only justified when the officer saw a bulge, thus creating a reasonable concern for safety. *Id.* at 112.

The rule that a police officer may not intrude on the physical integrity of a car's passenger compartment to inspect the VIN unless he has a reasonable belief, based on specific, articulable facts, that the car is stolen, fully satisfies this Court's requirements as to the fashioning of a Fourth Amendment standard to apply to a specific factual situation: (1) the standard is workable for application by rank and file, trained police officers; (2) the standard is reasonable, because when a police officer has no articulable grounds for suspicion, there is no probability that anything warrants investigation; and (3) the standard is objective, not based on the unfettered discretion of an individual police officer. *See Illinois* v. *Andreas*, 463 U.S. 765, 772-773 (1983).

In sum, Officer McNamee conducted a "search" governed by the Fourth Amendment when he intruded into respondent's vehicle in a quest for information contained therein which was not otherwise visible and where his intrusion exposed parts of the vehicle interior with respect to which a person has a legitimate expectation of privacy. Although the warrant requirement has been discarded with respect to automobiles, probable cause is still required whenever an officer conducts a search. Even where the intrusion amounts to less than a "full-blown search," an officer needs individualized suspicion with respect to the vehicle. The police may not exercise unfettered discretion to intrude on interests protected by the Fourth Amendment. An intrusion based on no more than

a mere unarticulable "hunch" is clearly illegal. Since Officer McNamee had neither probable cause nor reasonable suspicion, his intrusion into respondent's vehicle in search for the VIN violated the Fourth Amendment.

POINT III

PETITIONER'S CLAIMS, RAISED FOR THE FIRST TIME BEFORE THIS COURT, THAT (1) A MOTORIST LACKS A REASONABLE EXPECTATION OF PRIVACY IN A VEHICLE WHEN HE HAS NO LICENSE, AND (2) THE POLICE ARE ENTITLED TO SEARCH A MOTORIST'S VEHICLE WHENEVER THEY ARE AUTHORIZED TO PLACE THE PERSON UNDER ARREST FOR A TRAFFIC INFRACTION, ARE NOT PROPERLY OR ADEQUATELY PRESENTED FOR THIS COURT'S REVIEW AND, IN ANY EVENT, ARE MERITLESS.

As the State concedes (Br. for Pet. at 34 n.*), prior to the time this Court granted *certiorari*, petitioner had never raised in the state courts its present assertions that (1) a motorist lacks a reasonable expectation of privacy in a vehicle when and simply because he is unlicensed, and (2) the police were entitled to search respondent's vehicle simply because they *could* have arrested him for a traffic infraction. These legal claims were not presented to, passed on by, or developed in, the New York courts, and thus are not properly presented at this time. In any event, even if this Court reaches these contentions, it should reject them as lacking merit.

A. Petitioner May Not Raise In This Court Legal Issues That Were Not Presented To, Passed On By, Or Factually Developed In, The State Courts.

A long-standing rule of this Court bars review of questions urged by a petitioner or appellant that were not presented to or passed on by the lower courts. Because of "due regard for the appropriate relationship of this Court to state courts," this rule applies with particular force

with respect to cases that come before this Court from a state court. *McGoldrick* v. *Compagnie Generale*, 309 U.S. 430, 434 (1940). The rule against considering a question not pressed or passed on below has been described as being jurisdictional in nature. *See Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981); *Hill* v. *California*, 401 U.S. 797, 805-806 (1971); *State Farm Mutual Automobile Insurance Co.* v. *Duel*, 324 U.S. 154, 160 (1945).

This Court has consistently applied the "not pressed or passed on" rule to bar the State from raising legal grounds to rebut a defendant's Fourth Amendment claim where those grounds had not been presented to, passed on by, or developed in, the lower courts. For instance, in *Steagald* v. *United States*, 451 U.S. 204, 209 (1981), the Court refused to entertain a "standing" claim proffered by the government which had not been developed in the lower courts. In *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983), the Court held that it could not consider whether there is a "good faith" exception to the exclusionary rule where petitioner, the State of Illinois, had failed to raise this argument in the state courts, and the state courts had not passed on the question. Likewise, in *Hayes* v. *Florida*, 470 U.S. ___, 84 L.Ed.2d 705, 709 n.1 (1985), the Court held that it could not reach the State's argument, never raised in the state courts, that the inevitable discovery exception to the exclusionary rule was applicable to the Fourth Amendment issue presented. As in *Steagald*, *Gates* and *Hayes*, the Court should not address the new issues the State raises in this Court.

This Court has articulated three reasons why, in a case such as this, review of legal contentions first raised in this Court is improper: (1) general federalism concerns require that the state courts be given the first chance to consider the constitutionality of the actions of state officials; (2) requiring the State first to raise its claim in the state courts enables those courts to rest their deci-

sions on adequate and independent grounds in state law; and (3) when a legal argument was not raised below, the record is likely to be inadequate because the facts were not developed with a view toward resolving such an issue. *Illinois* v. *Gates*, *supra*, 462 U.S. at 221-222; *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). These three considerations apply with special force in this case.

Federalism concerns weigh heavily against considering petitioner's legal contentions that were not previously presented to the state courts. Surely, the New York courts are no less concerned than this Court about enforcement of the laws on New York highways. Indeed, since licensing statutes are clearly within the realm of state regulatory interests, the state courts should have the first opportunity to address the consequences of noncompliance with their own state regulations. Likewise, policies as to whether a particular traffic infraction merits a full arrest and search are particular concerns of the state courts and legislatures. Ordinary concerns for the proper relationship between state and federal courts require that novel claims, such as those petitioner seeks to raise, first be asserted in the state courts.

Similarly, the need to allow the state courts the opportunity first to consider adequate and independent state grounds counsels against this Court's consideration of these claims for the first time. As we show in Point I, *ante*, the New York Court of Appeals, since *People* v. *Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967), has consistently held that New York law bars the police from conducting a search, upon stopping a motorist for a routine traffic infraction, unless there are independent grounds to justify such an intrusion. A New York statute [Vehicle & Traffic Law § 401] governs how officers may obtain the VIN and other documentation from a stopped motorist (A. 60). The New York Court of Appeals has previously held that, under the New York Constitution, the "search

incident to arrest" doctrine is more restrictive on police officers than its analogue under the Fourth Amendment, as construed in *New York* v. *Belton*, 453 U.S. 454 (1981). Under New York law, a police officer needs a specific factual basis to justify the search of an arrestee, and there must be a temporal and spatial nexus between the arrest and the search. *People* v. *Gokey*, 60 N.Y.2d 309, 312, 457 N.E.2d 723 (1983); *People* v. *Smith*, 59 N.Y.2d 454, 458, 452 N.E.2d 1224 (1983). Had petitioner raised its "no expectation of privacy" and "search incident to arrest" claims below, the New York Court of Appeals might well have rejected them based on state law. Surely, where state law already substantially controls a question, this Court should be most reluctant to reach out and decide an issue never previously presented to the state courts.[18]

Moreover, under the procedural rules of the New York Court of Appeals, petitioner would have been barred from presenting its present claims to the New York Court of Appeals, as it had failed to raise them in the lower state courts. *See People* v. *Johnson*, 64 N.Y.2d 617, 619 n.2, 474 N.E.2d 241 (1984) (State cannot urge on appeal theory of brief, limited inquiry, where its claim in the lower court

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[18] The State concedes that, since *Marsh*, the New York Court of Appeals has construed New York law as it relates to the issues raised in this Court but which petitioner never asserted in the state courts (Br. for Pet. at 44 n.*). Since New York law already bars an officer from routinely conducting a search upon making an arrest, petitioner misreads New York law in suggesting that the New York Court of Appeals has left "unresolved" the question of whether an officer may conduct a search incident to a mere traffic stop (Br. for Pet. at 44 n.*). If New York law prohibits an officer from conducting a search routinely upon a full custodial arrest, it is illogical to suppose that an officer would be authorized to take such action upon a mere traffic stop. The only apparent reason why petitioner would fail to raise, in the state courts, a legal issue on which those same courts have already spoken extensively is that petitioner expected the state courts to hold in favor of respondent based on New York law.

was that investigative seizure was justified based on reasonable suspicion); *People* v. *Dodt*, 61 N.Y.2d 408, 416, 462 N.E.2d 1159 (1984) (where State argued in trial court that police had probable cause to arrest defendant, State cannot then urge on appeal that no arrest took place because defendant voluntarily accompanied the police to the station). Thus, had the State raised its new claims when the case was before the New York Court of Appeals, an adequate and independent procedural bar in New York law would have barred that court from reaching these propositions. *See Webb* v. *Webb*, *supra*, 451 U.S. at 498 n.4; *Wainwright* v. *Sykes*, 433 U.S. 72, 86-87 (1977).

Because petitioner never raised its new legal contentions in any of the three state courts which addressed the propriety of the search in this case, the factual record was not developed in such a manner as to permit evaluation of petitioner's claims. As to the State's claim concerning respondent's status as an unlicensed motorist, the record is clearly inadequate. The record establishes only that respondent had no driver's license the day he was stopped by Officers Meyer and McNamee. In fact, the judge who presided at respondent's suppression hearing barred the prosecutor from inquiring whether respondent ever had a license (A. 36), because it was not relevant to any legal issue asserted by the State in the courts below. It is pure speculation to suggest that respondent *never* had a license and, therefore, was an unsafe driver who had to be taken off the road (Br. for Pet. at 35). It may have been that respondent's license simply expired the day before the police officers stopped him, that he had a license renewal application pending, or that his license was lost, misplaced, or stolen. Since these factual possibilities could affect, if not defeat, petitioner's legal claim and policy arguments concerning the "unlicensed" motorist, petitioner's claim cannot properly be addressed.

The factual record is equally inadequate to permit evaluation of the State's claim that the police should have been permitted to search respondent's vehicle simply because they could have arrested him for speeding. As the State's claim is based, in part, on the assertion that the officers' failure to arrest respondent for his traffic infractions was "merely fortuitous" and that they only "hesitated" to effect a full custodial arrest in this case, the factual record is insufficiently developed. There was, simply, no evidence that respondent would have been arrested, quickly or otherwise, merely because the officers observed him driving 5 to 10 miles per hour above the speed limit. Nor was there any testimony that respondent would have been placed under arrest simply because he was driving a car with a cracked windshield and did not have a driver's license. There is no evidence that this was New York Police Department policy or practice, or the routine practice of the officers who stopped respondent. Indeed, to the extent the record was developed as to this issue, it clearly does not help the State's argument. Respondent was merely given a summons for two infractions. The most likely scenario is that, had Officer McNamee not entered the car and found a gun, the officers would have permitted respondent to proceed on his way. *See People* v. *Marsh*, 20 N.Y.2d 98, 102, 228 N.E.2d 783, 786 (1967) ("[T]he statutory scheme does not contemplate treating [the motorist] as a common criminal to be booked, photographed, fingerprinted and jailed.").

The claims the State now desires to raise in this Court are especially inappropriate for consideration without discussion below because they require determinations regarding state licensing requirements and state practices concerning arrests for routine traffic infractions. It would be particularly inappropriate for this Court to consider these arguments without an opportunity for the state courts first to consider definitive questions of under-

lying state law that, in view of the extensive development of New York law as to these general matters, may render academic any federal question.[19]

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[19] The cases petitioner cites in support of its assertion that its claims are properly presented for this Court's review (Br. for Pet. at 34 n.*) are inapposite. In both *Illinois* v. *Gates*, 462 U.S. 213 (1983), and *Steagald* v. *United States*, 451 U.S. 204 (1981), the Court held it could *not* reach the Fourth Amendment arguments the state sought to raise, as they had not been asserted or factually developed below, precisely the situation here. In *Wilson* v. *Cook*, 327 U.S. 474 (1946), the Court held it could not reach an issue that was neither presented to nor decided by the state court. Even though the question sought to be raised in this Court was related in some way to the one presented to the state court, and even though it arose under the same implied federal immunity from state taxation, the argument was not properly before the Court because it was distinct from the question decided by the state court. *Id.* at 483. The same rule requires the Court to refrain from deciding the two new issues the State seeks to raise in the instant case. Although both issues arise under the Fourth Amendment, they are clearly distinct from the narrow questions presented to, and decided by, the New York Court of Appeals. In *Raley* v. *Ohio*, 360 U.S. 423 (1959), the argument in the lower courts was a due process claim arising from a state agency's failure to instruct a witness to answer or else be held in contempt. When the case came before this Court, the petitioners contended that they relied on positive assurances that their Fifth Amendment privilege was available. The Court permitted this claim to be raised because it was "only a variation" of the former theme, which was put into sharper focus by the Ohio Supreme Court's theory of decision. *Id.* at 437 n.12. Here, by contrast, petitioner proposes entirely new theories, never advanced before. Moreover, this case does not involve a sharpening of focus of arguments considered by the state courts because the State never gave those courts the opportunity to pass on the contentions sought to be raised here. Since the record in the instant case is inadequate to permit resolution of the new issues the State wishes to raise, these issues are not properly before the Court. *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). Under this Court's precedents, thus, it is plainly not enough that the issue before this Court involves the same general constitutional provision (*i.e.*, the Fourth Amendment) that was addressed in state court. *Cf. Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972). The concurring opinion in

A final reason this Court should refrain from reaching the additional claims the State now raises is that they were not presented in its petition for a writ of *certiorari*. *See* Supreme Court Rules 21.1(a) and 34.1(a). For all the foregoing reasons, this Court should decline to address the arguments raised in Points I.C. and I.D. of petitioner's brief.

B. On The Merits, The State's Assertion That An Unlicensed Motorist Lacks A Reasonable Expectation Of Privacy In A Vehicle He Lawfully Possesses Is Incorrect.

Although petitioner styles its claim in terms that avoid the word "standing,"[20] the State's contention reduces itself to the assertion that a motorist has no standing to assert the violation of his Fourth Amendment rights simply because he lacks a driver's license. This assertion should be soundly rejected as lacking any basis in logic or precedent.

The State's contention that an unlicensed motorist lacks standing to assert a violation of his Fourth Amendment rights arising from a search of his car is fundamentally flawed. Under the precedents of this Court, a determination as to standing looks to whether the litigant is in

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Fuller v. *Oregon*, 417 U.S. 40, 58 (1974) (Douglas, J., concurring), on which the State relies, relates to a case in which one Justice, in dissent, is criticized for raising an issue "substantially different" from one that had previously been developed in the state courts. Finally, *Scott* v. *United States*, 436 U.S. 128 (1978), simply is not a case where a party raised an issue in this Court that had not been raised below.

[20] Petitioner's reluctance to cast its argument in "standing" terms may arise from this Court's holding, in *Steagald* v. *United States*, 451 U.S. 204, 209 (1981), that the government may not raise a "standing" argument in this Court for the first time. As in *Steagald*, although the grounds for the State's "expectation of privacy" claim existed at the time of the suppression hearing, this contention was never asserted until the case came before this Court.

lawful possession of the object which is searched, and whether he asserts his own right to be free from unreasonable searches and seizures. *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978). Notably, the State concedes that respondent was in lawful possession of the car when he was stopped by the police (Br. for Pet. at 37). Therefore, under established law, respondent crossed the basic threshold of "standing" to assert a violation of his Fourth Amendment rights arising from Officer McNamee's search of the vehicle. Yet, the State urges that, although a person has lawful possession of the chattel in question, his ability to assert his Fourth Amendment rights can be defeated solely by virtue of the way in which such chattel is used. The State cites not a single case which supports this novel proposition.

Indeed, the single hypothetical cited by the State illustrates the absence of any justification for the doctrine petitioner proposes. If a car thief lacks standing to assert a Fourth Amendment violation arising from a search of the stolen car (Br. for Pet. at 36), that is because his possession of the vehicle, *ab initio*, is unlawful. Thus, as a threshold matter, since such a person had no lawful possession of the chattel, he has no right to litigate any invasion of privacy with respect to it. By contrast, a motorist, irrespective of his licensed status, has an established possessory interest, and thus has legitimate expectations of privacy, in the vehicle.

Nor is there any logic to the State's assertion that respondent lost his expectations of privacy by turning on the ignition and driving down the highway (Br. for Pet. at 37-38). The State's contention rests on two assumptions: first, that when respondent commenced driving the vehicle, he had to expect that he would commit an act which would give rise to a lawful stop of his car by the police; and second, that, upon being stopped, respondent "had" to have known that the police would search his vehicle (Br.

for Pet. at 35-36). Based on these assumptions, the State retrospectively concludes that respondent had no expectation of privacy when he first commenced operation of the vehicle. Not only is this argument unacceptably attenuated, but it also rests on pure speculation. There is no evidence that respondent had reason to believe that he would be stopped. Moreover, the fact that he closed the door of his car when he got out to talk with the police officers indicates that respondent had a clear expectation of privacy with respect to the vehicle's interior. Finally, the State cannot reasonably assert that respondent "had" to have known that his vehicle would eventually be searched. In fact, on this record, there is every reason to believe that the officers here would merely have issued respondent a summons and would have allowed him to proceed, had Officer McNamee not entered the car and found a weapon. *See People* v. *Howell*, 49 N.Y.2d 778, 779, 403 N.E.2d 182 (1980) (arrest is neither called for nor preferred procedure when motorist is stopped for reckless driving, a misdemeanor). The State cites no evidence in support of its assertion (Br. for Pet. at 35) that the police would, in fact, have placed respondent under arrest for his traffic infractions alone.[21] Nor does the State

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[21] Notably absent from this record is any support for the State's contention (Br. for Pet. at 35, 37) that any "presumption" of danger arises with regard to unlicensed motorists, which would presumably lend support to petitioner's assertion that the police officers necessarily would have taken respondent into custody on this ground alone. In New York, driving without a license is classified as a violation, for which a fine from $100 to $200 may be levied. New York Vehicle & Traffic Law § 509 (McKinney Supp. 1984-1985). There is no basis to assert, as does the State, that a driver who simply lacks a license can be compared to a person who attempts to drive while intoxicated (Br. for Pet. at 35 n.*). The extreme hazard posed by intoxicated motorists is such that one cannot conceive of a conscientious police officer permitting such a driver to proceed on his way. *See Welsh* v. *Wisconsin*, 466 U.S. ____, 80 L.Ed.2d 732, 746-747 (1984) (Blackmun, J., concurring).

advance any support, statistical or otherwise, for its contention that the vehicle would have been searched.

Mere unlawful use of chattel cannot defeat a person's previously attached, threshold entitlement to assert a violation of his Fourth Amendment rights to such chattel. Such unlawful use is relevant only to the subsequent determination of the ultimate Fourth Amendment claim. Thus, for instance, unlawful operation of a vehicle might lead to consequences under a state's regulatory statutes or penal laws, or, if a police officer knows of such a violation, the officer's knowledge may be considered in assessing the reasonableness of the officer's intrusion. The same rule applies in other settings. A person in lawful possession of premises, even if those premises are used illegally, has the right to insist that the police abide by the requirements of the Fourth Amendment when they intrude upon his possessory and privacy interests therein. While the illegal use of premises, if known by the police, may itself serve as a justification for a police intrusion on such premises, the mere fact of such illegal use is not sufficient to deprive the person of his threshold right to challenge the reasonableness of the intrusion under the Fourth Amendment. What the State suggests in the instant case is that a person, solely because of his illegal use of given property, could not complain of a Fourth Amendment violation, even where the police defy legal processes and do so without any knowledge of the illegal use.

The logical extension of a "standing" doctrine that turns on a person's illegal use of property he lawfully possesses illustrates the bankruptcy of the doctrine itself. For example, a person who is in lawful possession of premises, whose lawful possession thereof gives him an expectation of privacy therein, an invasion of which he has a right to litigate under the existing precedents of this Court, would lose standing solely on the ground that such premises are used illegally, such as for gambling [*McDonald* v. *United*

States, 335 U.S. 451 (1948)] or narcotics [*Johnson* v. *United States*, 333 U.S. 10 (1948)], or in violation of some local zoning, licensing, labor or health regulation. Ultimately, the State's contention is that a person who has an established possessory or privacy interest in property loses standing to challenge an invasion of such interests merely on the assumption that he must expect that his unlawful use of his property *might* come to light. This contention suggests that anyone who violates the law lacks standing to object to any violation of his rights under the Fourth Amendment.

The simple fact that a motorist lacks the same degree of privacy in his automobile that a person has within his own home, *cf. South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976), in no way supports the State's assertion that a motorist lawfully in possession of an automobile, who merely lacks a driver's license, forfeits all expectation of privacy, as might someone who has already been tried, sentenced and imprisoned for a criminal offense, such as a prisoner [*Hudson* v. *Palmer*, 468 U.S. ____, 82 L.Ed.2d 393 (1984)] or an escaped convict [*United States* v. *Roy*, 734 F.2d 108 (2d Cir. 1984)] (Br. for Pet. at 36-37). The State's contention is entirely lacking in merit.

In sum, the State has no support in logic or precedent for its claim that unlawful use of property defeats established possessory and privacy rights therein. Once a possessory interest and expectation of privacy is established, the threshold criterion of standing is met. Unlawful use of chattel is then relevant to the substantive Fourth Amendment analysis, but does not operate to deprive the lawful possessor of his already vested entitlement to challenge an invasion of his possessory interest in such chattel. A contrary result would create a wholesale exception to this Court's standing doctrine for anyone whose use of chattel is in technical violation of the law. Such cannot possibly be the case if the Constitution is to have any continuing

vitality in a world where regulatory statutes cover nearly every aspect of modern life.

C. On The Merits, The "Search Incident To Arrest" Doctrine Does Not Apply Where The Police, Although Authorized To Arrest A Motorist For A Traffic Infraction, Do Not Take Such Action.

The State's assertion that a police officer is entitled to conduct a search of an automobile whenever he is authorized to make an arrest, but does not take such action, is fundamentally flawed because it seeks to have this Court create a "search incident to possible arrest" doctrine. Such a doctrine finds no support in the history or sound policies of the Fourth Amendment. Rather, the State seeks to turn the narrow "search incident to arrest" doctrine on its head and apply it to a situation where none of the justifications for the doctrine exist.

In *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), this Court explained the rationale behind the "search incident to arrest" doctrine as follows:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Similarly, in *New York* v. *Belton*, 453 U.S. 454, 457 (1981), the Court wrote that the "search incident to arrest" doctrine adopted in *Chimel* v. *California*, 395 U.S. 752 (1969), provides "that a lawful custodial arrest creates a situation which justifies the contemporaneous search" of the arrestee.

One rationale for the "search incident to arrest" doctrine is the fact that, once a person is placed under arrest, that person retains little further expectation of privacy. *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977). This rationale is inapplicable to a case where, as here, the person is not placed under arrest. Other reasons for the doctrine are the need to "disarm the suspect in order to take him into custody," *United States* v. *Robinson*, *supra*, 441 U.S. at 234, and to prevent the suspect from escaping, *Abel* v. *United States*, 362 U.S. 217, 236 (1960). These reasons are equally inapplicable to the instant case, for there is no suggestion or evidence that Officers Meyer and McNamee were ever in danger, or that they had any intention to arrest respondent for his traffic infractions. A final justification for the "search incident to arrest" doctrine is the need to preserve evidence, which, as this Court recently held, is inapplicable in an ordinary investigative stop such as occurred in the instant case. *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983).

Moreover, to the extent the State relies on "the risks inherent in a traffic stop" as a basis for authorizing a "protective search of the vehicle" incident to a traffic stop (Br. for Pet. at 42), petitioner ignores the significance of *Michigan* v. *Long*, *supra*, 463 U.S. 1032. There, the Court authorized such a protective search only where there was a factual basis for the officer to fear for his safety. (Here, of course, there is no such evidence.) Thus, by implication, the mere fact of the traffic stop is insufficient to justify an intrusion into the vehicle.

Because of the narrow and limited nature of the "search incident to arrest" doctrine, for this rule to apply there must first be a lawful custodial arrest: "a search incident to a lawful arrest may not precede the arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U.S. 40, 67 (1968); *see also People* v. *Evans*, 43 N.Y.2d 160,

164-166, 371 N.E.2d 528, 531-532 (1977); *People* v. *Erwin*, 42 N.Y.2d 1064, 369 N.E.2d 1170 (1977).

It bears repetition (*see* Point I, *ante*) that, in New York, an arrest for an ordinary traffic violation such as the ones respondent committed in this case is anything but a foregone conclusion. In *People* v. *Howell*, 49 N.Y.2d 778, 779, 403 N.E.2d 182 (1980), the New York Court of Appeals wrote that the trial court

> was in error in its conclusion that merely because reckless driving is a misdemeanor rather than a traffic violation, the arrest was inevitable. An arrest in a situation such as was presented in this case was neither called for nor the preferred procedure.

If an arrest would not necessarily ensue in a case where the motorist has committed the misdemeanor of reckless driving, surely petitioner overstates its case in asserting that it was "merely fortuitous" (Br. for Pet. at 38) that the officers did not arrest respondent for having committed the traffic infractions of driving a car without a license and operating a vehicle with a cracked windshield, neither of which is even classified as a misdemeanor in New York. New York Vehicle & Traffic Law §§ 155, 375(22), 509(1) (McKinney Supp. 1984-1985). Neither inevitable nor "preferred" in New York, an arrest in the instant case was highly unlikely, as the officers did not even issue respondent a summons for a speeding violation [New York Vehicle & Traffic Law § 1180 (McKinney Supp. 1984-1985)] or claim that they would have arrested him for either of the two remaining violations.

Since the police did not arrest respondent for his traffic infractions, and there is no reason, either based on established practice or on this record, to assume they would have done so, the "search incident to arrest" doctrine is inapplicable. Applying the doctrine to cases in which the police are authorized to arrest a citizen for a petty offense, but they neither take nor intend to take such action,

would grant the police power to conduct searches in a limitless array of situations, thus substantially negating the public's right to be free from unreasonable searches and seizures. Adoption of the doctrine proposed by the State would thus lead to the illogical result of the police having power to search property belonging to citizens stopped for any number of petty offenses that the police themselves deem unworthy of an arrest.

The "search incident to arrest" doctrine is a limited, narrowly defined, exception to the general rule that prohibits a search in the absence of a warrant issued upon probable cause. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978). There is no cause to expand the doctrine to a situation where, as here, none of its justifications exist.

CONCLUSION

For the reasons stated in Point I, the writ should be dismissed. In the alternative, for the reasons stated in Points II and III, the judgment should be affirmed.

Respectfully submitted,

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